United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7376

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

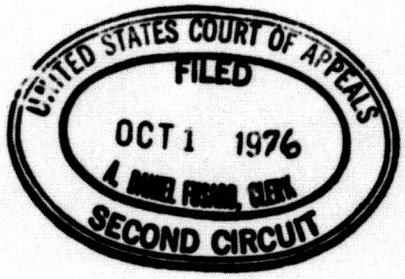
BLANCHE MITCHELL,

Plaintiff-Appellant,

v.

NATIONAL BROADCASTING COMPANY, et al.,

Defendants-Appellees.



B P/S

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE UNITED STATES EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE

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BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-et seq. (Supp. II, 1972). Private actions filed under Title VII provide the Commission with essential assistance in securing the elimination of employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Since the resolution of the question raised by this appeal may affect Title VII plaintiffs, the Commission presents its views to the Court.

STATEMENT OF THE CASE

This is an action brought by plaintiff, Blanche Mitchell, under 42 U.S.C. §1981 alleging that defendant, National Broadcasting Company (hereinafter "NBC") discriminated against her on the basis of race. The case is presently before this Court on an appeal from an order of the United States District Court for the Southern District of New York dismissing Ms. Mitchell's complaint on the grounds that the allegations of her complaint had previously been adjudicated in state administrative and judicial proceedings. The relevant facts, which are not disputed, were set forth in the affidavits and accompanying exhibits submitted on a motion for summary judgment. They may be summarized as follows:

On December 14, 1973, Ms. Mitchell filed a charge of employment discrimination against NBC with the New York State Division on Human Relations. A field representative for the state agency conducted an investigative conference to determine whether there was probable cause to credit the charge. Testimony at this conference was (1) not taken under oath (2) not governed by the formal rules of evidence and (3) not transcribed. Ms. Mitchell was present at the conference but was not

represented by counsel. When Ms. Mitchell asked to see certain documents which counsel for NBC showed the investigator as he was testifying, she was not permitted to do so, and, hence, could not object or respond to the documents' contents.

Several weeks after the conference, the Division on Human Rights issued its determination that there was no probable cause to believe that plaintiff had been discriminated against and dismissed the complaint. Ms. Mitchell pursued her grievance through the state administrative system, arguing that the state agency had not fully investigated her allegations and that she had not been given a fair opportunity to present her case. An evenly divided State Human Rights Appeal Board affirmed the decision on the grounds that the dismissal was not arbitrary and capricious, or an unwarranted exercise of the state agency's discretion. Ms. Mitchell, represented by counsel, petitioned the Appellate Division, First Department, of the Supreme Court of New York for an order setting aside the administrative determination. Although empowered to send the case back to the state agency for further investigation, that court did not have the authority to decide the merits of Ms. Mitchell's claim. See American Jewish Congress v. Carter, 9 N.Y. 2d 223, 173 N.E. 2d 778 (1961). On November 7, 1974,

following a review of the administrative record and oral argument by counsel on the petition, the court confirmed the affirmance by the Appeal Board.

On November 20, 1975, Ms. Mitchell commenced this action in the United States District Court for the Southern District of New York alleging a violation of 42 U.S.C. §1981. Although the prayer for relief in the federal complaint contained a request for punitive damages, which was not available under state law, the factual allegations of the federal complaint were substantially the same as those contained in the state administrative charge. NBC moved to dismiss the action and for summary judgment on the grounds of res judicata and collateral estoppel, arguing that the issues raised in the complaint had been decided between the parties by the state proceedings. On July 29, 1976, the district court granted defendant's motion and dismissed the suit. This appeal followed.

ISSUE PRESENTED

Whether the no cause determination of the state administrative agency, which was affirmed by a state court which had no authority to reach the merits, has a binding effect on the theories of res judicata or collateral estoppel with respect to a federal action brought under 42 U.S.C. §1981.

ARGUMENT

I

A STATE AGENCY'S FINDING THAT PLAINTIFF WAS NOT DISCRIMINATED AGAINST CANNOT PRECLUDE PLAINTIFF FROM ASSERTING HER FEDERAL RIGHTS IN THE FEDERAL COURTS.

The doctrine of res judicata bars the litigation of a claim which had been conclusively decided in a prior action. It does not bar an action on an independent claim growing out of the same subject matter which could not have been asserted in the prior action. The district court's holding that the New York state agency's finding of no probable cause barred Ms. Mitchell from maintaining a subsequent action in federal court under 42 U.S.C. §1981 ignores the independent nature of the remedies under the state human resources statute and the federally conferred right of action under 42 U.S.C. §1981.

The Supreme Court has recognized that a person aggrieved by employment discrimination may be vested with a number of federal and state rights growing out of the same occurrence. See Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Where the rights are derived from independent sources, the Court has held that the avenues of relief open to an employee may be pursued

independently. In Alexander, the Court noted (415 U.S. at 48):

> the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights both under Title VII and other applicable state and federal statutes. (emphasis supplied).

In holding that an employee's statutory right to a trial de novo under Title VII was not foreclosed by the prior submission of his claim to final arbitration under a non-discrimination clause of a collective bargaining contract, the Court focused on the source of the rights and concluded:

> The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. Id. at 50.

When the Court considered another analogous provision of the Civil Rights Act, 42 U.S.C. §1983, it found that the right there conferred was "plainly federal in origin and nature" and was "supplementary to any remedy any state might have." McNeese v. Board of Education, 373 U.S. 668, 674, 672 (1963). See also Tipler v. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971), where the Sixth Circuit discussed the independent nature of the rights established by Title

VII and the National Labor Relations Act. It said (443 F.2d at 128-129):

> Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. This is because the purposes, requirements, perspectives and configuration of different statutes ordinarily vary. (citations omitted).

In the present case, the right which Ms. Mitchell asserted in the district court was wholly independent from that which she had sought to vindicate in the state forum. Had Ms. Mitchell wanted to, she would not have been able to assert the federal right in the state process. The jurisdiction of the state agency was limited to violations of state law; the jurisdiction of the state appellate court, which might otherwise extend over federal claims, was, in this case, limited to a review of the state agency's determination. See Human Rights Law 295-6(a).

Although state courts are bound to apply federal standards to federal claims brought in state court, there is no requirement that state courts apply federal standards to state claims. It would be inconsistent with the purposes of federal civil rights legislation to permit a state's application of state standards to a state claim to bar a subsequent federal action on an

independent federal claim. Every court of appeals, including this Court, which has addressed the question of the applicability of the doctrine of res judicata in the Title VII context has held that exhaustion of state remedies will not bar a subsequent federal action under Title VII. E.g, Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971); Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974); Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); IBEW, Local 5 v. EEOC, 398 F.2d 248, 250 n.3 (3d Cir. 1968), cert. denied, 393 U.S. 1021 (1969).

The district court distinguished the Title VII authority on the grounds that Title VII requires a plaintiff to file a state charge as a prerequisite to maintaining the federal action. The distinction is unpersuasive. To the extent that the federal right under 42 U.S.C. §1981 is wholly independent of any state proceedings, it would logically follow that such right is, even less than the remedy under Title VII, not subject to determination in the state proceeding. Moreover, although Title VII plaintiffs must initially resort to the state, they need not exhaust the state's remedies. Even if they do so, they will, nevertheless, not be barred from maintaining an action under Title VII. The same consideration which has led courts not

to give res judicata effect to state determinations in Title VII actions--the independence of the state right and remedy--is equally applicable in §1981 actions. See Wageed v. Schenuit Industries, Inc., 406 F.Supp. 217 (D. Md. 1975). There is no reason why a different result should obtain merely because the federal right asserted is derived from §1981 instead of Title VII. See Waters v. Wisconsin Steel Workers, 502 F.2d 1309, 1316 (7th Cir. 1974).

II

THE DOCTRINE OF RES JUDICATA IS INAPPLICABLE TO THE FACTS OF THIS CASE.

Assuming, arguendo, that the exhaustion of state remedies could bar a subsequent federal action under 42 U.S.C. §1981, the doctrine of res judicata is inapplicable to the facts of this case. Administrative determinations may be given res judicata effect only where both parties have had a full and fair opportunity to present their version of the facts. United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966).

Whether a given decision will be accorded res judicata effect depends on various factors relating to the nature of the administrative decision and the adequacy of the fact-finding process upon which it is based.

As the Ninth Circuit stated in Paramount Transport Systems v. Chauffeurs, Local 150, 436 F.2d 1064, 1066 (9th Cir. 1971), in holding that a union was foreclosed from relitigating matters of fact decided adversely to it in NLRB proceedings:

> We conclude that collateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process....

See also United Engineers & Constructors, Inc. v. International Brotherhood of Teamsters, 363 F.Supp. 845 (D. N.J. 1973); Hollander v. Sears Roebuck & Co., 392 F.Supp. 90 (D. Conn. 1975); International Wire v. Electrical Workers, Local 38, 357 F.Supp. 1018 (N.D. Ohio 1972), aff'd, 475 F.2d 1078 (6th Cir.), cert. denied, 414 U.S. 867 (1973).

Those standards have clearly not been met in the instant case. Many of the procedural defects to which the Supreme Court referred in its analysis of arbitration proceedings in Alexander, supra, 415 U.S. at 57-58 are also applicable to the state proceedings here:

> . . . the usual rules of evidence do not apply, and rights and procedures common to civil trials, such as discovery, complusory process, cross-examination and testimony under oath are often severely limited or unavailable.

See also Ferrell v. American Express Co., ___F.Supp.___, 8 FEP Cases 521, 525 (E.D. N.Y. 1974) where the court held that a federal action was not barred where the parties before the state agency were not provided with counsel, and the issues argued were not "in the same posture in which they might be argued by an attorney in a federal action."

In the instant case, defendants concede that Ms. Mitchell never had a formal hearing. The investigatory conference upon which the no probable cause determination was made was not a full hearing, conforming to the standards of due process. The conference was not governed by the formal rules of evidence. Testimony was not taken under oath and was not transcribed. Furthermore, Ms. Mitchell, who was not represented by counsel, was not given an opportunity to look at certain documents which were being used to evaluate her claim. Since this informal hearing did not afford Ms. Mitchell procedural due process, and subsequent court review could not have reached the merits of her complaint, the district court erred in barring Ms. Mitchell's federal action under §1981.

CONCLUSION

For the foregoing reasons we respectfully urge this Court to vacate the order of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief of the United States Equal Employment Opportunity Commission as Amicus Curiae were mailed this day, postage prepaid, to the following counsel of record:

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